The Defamation Action and Municipal Politics

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The article considers the operation of the law of defamation in the functional setting of municipal politics. It examines the courts' handling of the crucial balance between freedom of speech and the protection of the individual from unfair comment and criticism in a number of recent cases involving municipal corporations and politicians. It also discusses the application of the substantive elements of the defamation action and the defences and the accommodations of the law of defamation to the municipal corporate entity.

Dans cet article, l'auteur examine l'application du droit de la diffamation dans le contexte de la politique municipale et analyse, à la lumière de quelques décisions récentes mettant en cause des municipalités et politiciens, la démarche des tribunaux face à l'impérative nécessité de concilier liberté de parole et droit de l'individu à être protégé contre des imputations ou critiques injustifiées. L'article examine également l'application des éléments essentiels de l'action en diffamation et des moyens de défense ainsi que l'adaptation du droit de la diffamation aux municipalités.

THE "STING" AND LOCAL POLITICS

The business of municipalities has always been a relatively fertile field for defamation actions. The jurisprudence of recent years suggests that there has been no decrease in the volume of litigation generated in the arena of municipal politics. Indeed, there has been a series of decisions in defamation cases involving municipalities, mayors and municipal councillors which has gone some way towards clarifying the application of the law of defamation to the municipal entity. At the same time there has been a number of cases involving municipal politicians which have involved fundamental questions about the proper balance between free speech and the protection of the individual from calumny which should be struck within the general law of defamation

The comparative frequency of defamation actions in the field of municipal politics has two basic of explanations. The first flows from the principles of defamation law itself. For many years now it has been well established that the meetings of municipal councils, unlike those of Parliament and of the provincial legislatures, are not occasions of absolute privilege in which even statements which are patently and knowlingly false and which are prompted by malice or spite fall within

the protection afforded by the privilege.[1] The municipal council, has the benefit of only a qualified privilege for its deliberations, requiring an honest belief in the truth of statements made and an absence of malice.[2] Accordingly, statements made in council may be adjudged defamatory and the author found liable. One suspects that members of the federal Parliament and provincial legislatures are a good deal more circumspect about the setting in which they make strong statements than their municipal counterparts because of absolute privilege.[3] A second explanation is the lack of party affiliations in local politics. Political life has a tendency to attract strong personalities at all levels, but on the federal and provincial planes individual feeling and bias is often tempered by party discipline and the need to submerge individual frustration in the collective interest. In municipal government the only constraint is that which the individual sets for himself. A third is the fact that local politicians are perceived by the citizen as affecting his day to day life more directly and intimately than their federal or provincial counterparts. The result is sometimes an intensity of feeling on issues which makes for a strong brand of criticism.

The purpose of this paper is two-fold. It examines the special rules relating to defamation which flow from the fact that the municipal corporation is not a natural person and must act through human agents; and it attempts to show the way in which the courts attempt to strike a balance between the candid exchange of opinion on matters of public interest on the one hand and the protection of the individual from unfair comment or criticism on the other. In the latter context, particular attention is paid to the courts' handling of the defences of qualified privilege, and fair comment.

DEFAMATION AT CITY HALL: WHO CAN SUE AND BE SUED?

Defamation is by its nature a tort action which has a personal quality to it. Historically it developed as a means whereby individuals could protect or salvage their reputations from unfair and false imputations made by other individuals. In time, however, the recognition by the general law of the personality of corporations raised the issue of whether these entities had the capacity to defame and be defamed.

It was accepted in the nineteenth century that a commercial corporation could be adjudged personally liable for a defamatory

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[1]Established in *Royal Aquarium & Summer & Winter Garden Society* v. *Parkinson*, [1892] 1 Q.B. 431 (C.A.).

[2]See Gatley on *Libel and Slander*, (7th ed.), at 419.

[3]The dangers of speaking candidly outside the House may not be as great in light of the decision in *Stopforth* v. *Goyer* (1979), 8 C.C.L.T. 172 (Ont. C.A.).

statement,[4] and it was soon after established that what was true of a commercial corporation was also true of a municipal corporation. Thus in the early Ontario case of *McLay* v. *The Corporation of the County of Bruce*[5] a municipality was found liable in defamation when the members of council published, in pamphlets and in the minutes of council, material which impugned the honesty of the plaintiff registrar of deeds for the municipality. Implicit in the judgement is the assumption that the members of the council were not acting in their individual capacities, but as a body corporate carrying out its purposes under statute.

Until recently, however, it had not been clear that a municipal corporation could sue for defamation. The right of a commercial corporation to sue for defamation reflecting upon the conduct of its business was established firmly in Canada in 1915 in the case of *Price* v. *Chicoutimi Pulp Co.*,[6] but the position of municipal corporations was thought to be as set out in *Manchester Corp.* v. *Williams*[7] in which the English Divisional Court concluded that, while a libel action might be brought by a corporation in relation to property, this was not possible where the libel affected personal reputation. This uncertainty may have been resolved by a recent British Columbia decision, *Prince George* v. *British Columbia Television System Ltd.*[8] Mr. Justice Toy found that a municipal corporation could sue in defamation for statements suggesting that it, "through its council and its other servants and agents had been corrupt, dishonest, fraudulent, inefficient and unfit to discharge its duties".

> A municipal corporation, although it lacks many indicia and attributes of a natural person, enjoys a reputation delineated by those powers and obligations created by the *Municipal Act*, the functions that it actually engages in and the manner in which it performs those functions.[9]

The recognition of a right in a municipal corporation to sue in defamation may seem to be an innocuous development and the logical correlative to allowing a defamation action against such a body. There are, however, important policy considerations which gainsay extending the law in this way. In reaching his decision in the *Prince George* case, Toy J. found persuasive *Bogner Regis U.D.C.* v. *Campion*[10]; a recent English decision in which a municipal corporation successfully sued an individual for defamation. The decision in that case is one which should

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[4]See *e.g.*, *Whitfield* v. *South Eastern Rly. Co.* (1858), 120 E.R. 451 (Q.B.).

[5](1887), 14 O.L.R. 398 (C.P.D.).

[6](1915), 51 S.C.R. 179 (S.C.C.).

[7][1891] 1 Q.B. 94 (Div. Ct.).

[8](1978), 85 D.L.R. (3d) 755 (B.C.S.C.).

[9]*Ibid.*, at 758.

[10][1972] 2 All E.R. 61 (Q.B.).

give pause to those who would argue that an artificial person is in no different position from the natural person in terms of the effect of a defamatory statement, and that it is only reasonable that both should have the right to sue.

The defendant, Mr. Campion, a ratepayer, had engaged in an extended campaign of very forceful and pungent criticism of the local council. This included the writing of highly critical letters to the editor of the local newspaper, and appearances on television in which he complained bitterly of the conduct of council and its members. At a subsequent meeting of local ratepayers, the defendant distributed a leaflet to those attending. In this document he made further strong attacks on council and individual members. He alleged that the business of council had been carried on in a dictatorial, undemocratic manner, and that the council had brought pressure to bear on the editor of the local newspaper to repress a free press and free speech. He went on to assert that many council members had personal axes to grind and as a result council was not carrying out the electors' wishes. In conclusion he maintained that council's policy of destroying peoples homes as "unfit" was dishonest when the land was to be used for tourist developments. He was sued for libel by the municipal corporation.

Brown J. noted that both trading corporations and trade unions had been recognized as enjoying the right to sue in defamation. Seeing no difference between the trading reputation of a commercial corporation and the business reputation of a trade union on the one hand, and the governing reputation of a municipal corporation on the other, he determined that it was legitimate for the latter to sue for a libel affecting its personal reputation. He went on to find that the defences of qualified privilege and fair comment were not made out by the defendant and that the latter was guilty of libelling the plaintiff. He was ordered to pay £2,000 damages and costs. The latter, it seems, amounted to something in the order of £30,000.[11]

The major problem with this decision is that it places a very significant curb on the right of the individual citizen to criticize government. As Professor Weir has so ably argued, it is wrong that any artificial person, which by definition cannot enjoy feelings and social relations in the normal sense and cannot suffer loss to those interests, should have the benefit of a legal action which limits the right of free speech, but does so on the assumption that a natural person would suffer embarrassment and a lowering of reputation in the minds of his peers from harsh and untrue statements.[12] The more so is it wrong

[11]The information as to costs is revealed in Weir, "Case Comment — Local Authority v. Critical Ratepayer — A Suit in Defamation", (1972) 30 *Camb. L.J.* 238. Professor Weir also indicated that a prime reason for the corporation suing rather than individual councillors, was that legal aid was not available for defamation actions.

[12]*Ibid.* Professor Weir suggests that a corporation should only be able to recover damages for loss actually incurred as a result of a false statement improperly made by a defendant. The appropriate tort action is injurious falsehood, not defamation.

when it is opened up to governmental bodies and allows them to chastize bothersome citizens who criticize their policies.

> Nor need governments have all the rights of individuals; there are two reasons for this: the first is that governments are not individuals, and the second is that there are some things they, as governments, should have to put up with. One of the things a government should have to put up with is criticism. The only criticism which government may properly repress is criticism which is harmful to the state or public order, and the only proper method for such repression is the criminal law. The exclusive use of the criminal law in such cases is safer for the citizen and the citizenry because its use attracts attention by showing that the relations of state and citizen are in issue, and its processes contain, for that very reason, many safeguards not found in private law.[13]

It is to be hoped that the final word on this matter has not been spoken by the Canadian and English courts. The blithe acceptance of the right of a municipal corporation to sue in defamation without an examination of the policy factors which militate against it can only result in an unfortunate confining of the right of free speech. Moreover, the decisions in the two cases sit very awkwardly beside the significant degree of leeway which the House of Lords has since allowed to municipal politicians to vent their frustrations against each other.[14]

Since a municipal corporation has to act through individuals the issue of vicarious as well as personal liability is important. Although a defamatory statement made by an individual employed by a municipality undoubtedly opens that individual to a personal action by the subject of the statement, it may be open to argument that the statement, having been uttered by the individual in the course of carrying out his responsibility as an employee of the corporation, the latter should also be open to suit. If loss flows from the statement there is no reason why the employer should be immune.

It is, however, important to distinguish cases of true vicarious liability from those of liability through delegation. Municipalities, particularly the larger urban municipalities, will conduct at least part of their business through standing or special committees. These bodies will deal with specific areas of local government, such as finance, property and planning.[15] Municipalities may also have the power of appointing boards — for example, parks and recreation boards — with responsibility for the provision of certain municipal services.[16] Insofar as a tortious act, including a defamatory statement, is made by a committee

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[13]*Ibid.*, at 241.

[14]See *Horrocks* v. *Lowe*, [1974] 1 All E.R. 662 (H.L. Eng.).

[15]I.F. Rogers, *The Law of Municipal Corporations*, (2nd ed.), Vol. 1, at 270.

[16]See *e.g.*, *Municipal Government Act* R.S.A. 1970, c. 246, s. 208; *Public Parks Act* R.S.O. 1970, c. 384.

or board for which the municipality is responsible and falls within the authority delegated or granted to it, it is treated by the law as if made by the municipal corporation itself.[17]

Vicarious liability, on the other hand, depends on the establishment of three factors: 1) a master-servant relationship must exist; 2) the servant must be carrying out the duties of the municipal authority; 3) the tort must have been committed during the course of and within the scope of the servant's employment with the municipality. As far as actions for defamation are concerned, it is unlikely that a municipality would be accounted liable for the ill-considered statements of the mayor and councillors as individuals. While they may be considered in popular parlance as 'servants of the people' they are not at law servants or employees of the corporation.[18] They are rather its directors, and unless they are acting in their corporate capacity or as official representatives of the corporation in making statements, liability will be strictly personal. On the other hand, any employee of the municipality or of one of its departments or of a body enjoying delegated authority from the corporation, may generate the vicarious liability of the corporation for his statements. Normally an employee is defined as one who is under a contract of service to the employer. It makes no difference whether the employee is professional or non-professional. The question is whether the individual is part of the master's organization and subject to his overall administrative control, not whether his work is closely supervised or not.[19]

The requirement that the servant must be carrying out the duties of the municipal authority is designed to protect the municipal corporation when an employee may be acting under the authority of some other level of government. This might well be the case, for instance, with a sanitary engineer normally employed by the city, but acting in the circumstances on behalf of the Board of Health under Public Health Legislation.[20]

The notion that the tort must be committed during the course of and within the scope of the servant's employment serves to distinguish cases where the servant is operating in an employment or representative

[17]There are of course local boards which are constituted as corporations separately from the municipal corporation. Tortious liability in such cases applies only to the local board, not to the municipality. See Rogers, *supra* footnote 15, Vol. 2, at 1429-33.

[18]See *e.g.*, *Gaul* v. *Ellice* (1902), 3 O.L.R. 438 (Ont. C.A.) at 444.

[19]Fleming, *The Law of Torts*, (5th ed.), at 360-2.

[20]The weight of authority seems to be that an official who is appointed as a public officer by virtue of provincial legislation, whether or not the municipality selects him, is not a servant of the municipality. See *e.g.*, *McKenzie* v. *Chilliwack* (1910), 14 W.L.R. 97 (B.C.S.C.); *Delbridge* v. *Brantford* (1917), 40 O.L.R. 443 (Ont. C.A.); *Nickall* v. *Windsor* (1926), 59 O.L.R. 618 (Ont. C.A.); *Mead* v. *Marquis R.M.*, [1928] 2 D.L.R. 524 (Sask. Q.B.); *Brebner* v. *Edmonton*, [1947] 2 D.L.R. 877 (Alta. S.C.), aff. [1948] 2 D.L.R. 560 (Alta. A.D.); *Burkard* v. *Camrose* (1953), 8 W.W.R. (N.S.) 401 (Alta. D.C.). Legislative provision is also sometimes made to affirm this, see *e.g.*, *Municipal Act*, R.S.A. 1970, c. 246, s. 402.

capacity, and those where he is acting independently for his own purposes and benefit. This general distinction has never been particularly easy to make because a servant may be ostensibly working in an employment situation, but actually furthering or pursuing his own private and contrary interests. The classic case is the bartender who, rather than restraining a recalcitrant customer, vents his passion by violently assaulting him, causing serious bodily injury.[21]

In some tort actions, most notably in negligence, the tendency of the courts has been to treat the notion of scope of employment liberally and to go so far as to say that as long as the servant is acting within the general authority given him, it does not matter that he goes about his business negligently, even if it is in an unauthorized fashion.[22] Even if he carries out his duties in a way in which he causes wilful harm to another, the master may still be liable if he is acting in his master's interests and if the degree of impropriety does not convert it into an act of personal revenge or spite.[23]

With defamation the approach of the courts has been to circumscribe more closely the notion of course of employment. There is no doubt that a corporation may be vicariously liable for defamatory remarks made by its servants. So in *Harrison* v. *Joy Oil Ltd.*[24] it was held that the defendant company was liable for the slanderous remarks of its superintendent of service stations in which he accused the plaintiff, a service station manager, of misappropriation of funds. It was found to be the superintendent's duty to obtain a daily report from each service station and to see that the state of affairs at each was satisfactory. The statements were thus made within the superintendent's authority as a representative of the company. However, the courts show distinct hesitation automatically to equate authority to make statements which may be defamatory with authority to communicate. In effect, they have required that the statement must be of a kind, and connected with, a subject matter about which the servant is authorized to make statements. In *Glasgow Corporation* v. *Lorimer,*[25] for example, the House of Lords held that a municipal corporation was not liable for slander committed by a city tax collector when he accused the plaintiff of altering a receipt and committing forgery. In the opinion of their Lordships the servant had neither the express nor the implied authority to express an opinion on a matter of this nature. The inference is that he could explain his purpose and interpret the statement of account, but no more.

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[21]See *e.g.*, *Griggs* v. *Southside Hotel,* [1947] 4 D.L.R. 49 (Ont. C.A.).

[22]Fleming, *The Law of Torts,* (5th ed.), at 364-7.

[23]*Ibid.*, at 370-3.

[24][1938] 4 D.L.R. 360 (Ont. C.A.).

[25][1911] A.C. 209 (H.L. Scot.).

This judicial caution reflects a concern not to describe unreasonably wide perimeters for the operation of vicarious liability in the case of a tort in which the professional shades so easily into the personal. As Atiyah has remarked:

> This narrow view is probably inevitable because an application of a broad approach demonstrated by the courts when dealing with other torts would produce grotesque results in this field. It could plausibly be said that any servant who is required to say anything in the course of performing his duties is merely doing an authorized act in an improper way when he slanders someone and thus justify holding the master liable. Clearly, this will not do . . . .[26]

Notwithstanding the hesitant approach adopted by the courts, there are clear cases in which vicarious liability is likely to attach. The most obvious situations are those in which the servant has a broad authority and discretion to make statements within the organizational system of the corporation. Commissioners, town clerks, and municipal solicitors are good examples. Moreover, it is, as Atiyah suggests, easier to make the link when the communication is written, as it is more likely to fall within the servant's express or implied authority.[27]

THE LIMITS OF MUNICIPAL DEFAMATION

The determination of whether words, spoken or written, are capable of a defamatory meaning in a case involving a municipality, its officers or employees, proceeds within the framework of general legal principles. These principles are perhaps most clearly stated by Mr. Justice Egbert of the Alberta Supreme Court in his address to the jury in *Willows* v. *Williams.*[28] The case involved allegedly slanderous statements made at a hospital board meeting by the chairman concerning the character of an applicant for the position of hospital matron. The judge stated:

> Defamation consists in the publication without justification of a false and defamatory statement regarding some other party. Defamation may consist either in libel or slander. In libel the defamatory statement is made in some visible and permanent form and in slander it is made in spoken words, or in some other transitory form. A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers, which lowers him in the estimation of the right thinking members of society, and in particular which causes him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem. I would point out to you that mere insult or vulgar abuse does not amount to defamation because these things are only offensive to a man's dignity and do not lower him in the regard in which he is held by other members of society. The law says that any man is entitled to his reputation unimpaired by defamatory attacks by a third person, and

[26]Atiyah, *Vicarious Liability in the Law of Torts* (London: Butterworths, 1967), at 274.

[27]*Ibid.*, at 275.

[28](1951), 2 W.W.R. (N.S.) 657 (Alta. T.D.).

> published statements which tend to destroy or impair that reputation are actionable. The test of the defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion or feelings of other persons. The real test is: "Would the words tend to lower the plaintiff in the estimation of right thinking members of society generally?"[29]

The determination of whether a statement tends to lower the plaintiff in the estimation of right thinking members of society is sometimes attended with difficulty. This is particularly true when the words in and of themselves may appear unexceptional. Where the words clearly impute dishonesty, corrupt motives, immorality and the like to a person few problems arise with characterization.[30] However, where the words are less colourful or less obviously vindictive much will depend on the circumstances in which the statement is made. For example, words which might be characterized as mere insult or vulgar abuse in a heated council debate may lose that character when they are used as the basis for a broader ranging attack in the community through the media. Thus in the recent case of *Loan* v. *MacLean*[31] the plaintiff, an alderman and local teacher, brought a successful defamation action against the mayor of the municipality when the latter, in a recorded telephone conversation with a reporter for a local T.V. station, referred variously to the plainfiff as "one of the biggest jokes Peachland has had for a long while", "stupid", "out of his depth", "a bother". He also identified him as a teacher. Kirke Smith J. in addressing the issue of whether the words were defamatory had this to say:

> The words here, spoken of a high school teacher with specific reference to his profession, are to me clearly disparaging. They were spoken, and broadcast, in a comparatively small community, where every one knows everyone else's business, and it seems to me in those circumstances, where right thinking persons in that community could and probably would interpret them as defamatory, there must be legal liability.[32]

In dealing with the defence of qualified privilege, the judge referred expressly to the fact that the words had not been spoken at the council meeting, but in the community at large.

While the Courts are obviously concerned with seeing that municipal politicians do not transcend the bounds of propriety in their attacks on others, they are conscious of the need to distinguish mere strong criticism from statements damaging to a person's reputation. In

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[29]*Ibid.*, at 658. In a number of Canadian jurisdictions the historical distinction between libel and slander has been abolished; *i.e.*, Alberta, Manitoba, Yukon Territory.

[30]A classic example from Western Canadian jurisprudence is *Minchin* v. *Samis* (1913), 4 W.W.R. 891 (Alta. A.D.) in which the words "I do not blame Alderman Minchin for representing his constituents: it is a well known fact that he had Johnny Reid carting all the whores, pimps and undesirable voters in the city to vote for him and that was how he was elected" were adjudged to be slanderous as showing "a lack of integrity".

[31](1975), 58 D.L.R. (3d) 228 (B.C.S.C.).

[32]*Ibid.*, at 231.

Faminow v. *Reid*[33] the plaintiff was a barrister appearing before a city council representing residents opposed to the location of a boarding home for children in the neighbourhood. At a public meeting called by the municipality to discuss a by-law amendment which would accommodate the proposed use, the plaintiff failed to reveal the contents of two letters from residents which were contrary to the development and would have adversely affected the 60% consent required from neighbouring residents. The by-law was passed through two readings at that meeting. At a subsequent council meeting when the by-law came up for final reading, the plaintiff was invited to speak. He endeavoured at that stage to introduce the two letters. The defendant, the mayor, thereupon ruled the letters out of order, maintaining that they should have been presented at the earlier public hearing. Moreover he remarked "This is a very high-handed way of doing business". Mr. Justice Ruttan concluded that the use of the word "high-handed" was not defamatory.

> The normal meaning, the dictionary meaning, is "overbearing, arrogant or arbitrary", "acting with a high hand". Such a comment may reflect the exasperation of a mayor and Council or the opinion of a judge in court to a counsel's over-zealous representation but is no reflection on the plaintiff with respect to his services to his client or his professional character and ability.[34]

His Lordship went on to say that he could find no innuendo in the words used suggesting that the plaintiff was unscrupulous, dishonest in his conduct, unfit to represent his clients, or had acted in a manner unbecoming to his professional calling.

There is evidence to suggest that in the arena of municipal politics the courts expect some degree of fortitude from the politicians in facing criticism, even strong criticism, when it takes place in council meetings or even where it appears in the columns of the press. The fortitude which is demanded will be greater where surrounding circumstances suggest that criticism is jutified. An interesting case in this regard is *Rice Sheppard* v. *Bulletin Co. Ltd.*[35] Following a judicial inquiry into the conduct of civic government in Edmonton which determined that something was seriously wrong, particularly with the enforcement of the criminal law in the city, the defendant newspaper published a series of articles on the state of the city's affairs. In the course of one of the articles, the plaintiff, a city alderman, was associated with the "administration party" which the newspaper claimed had condoned and encouraged crime and vice in the city. The article also went on to suggest that the plaintiff and others had benefited financially from contracts made while the "Tammany type" administration was in power.

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[33](1972), 24 D.L.R. (3d) 554 (B.C.S.C.).

[34]*Ibid.*, at 558.

[35](1917), 55 S.C.R. 454, *per* Davies J. at 457-66.

A majority of the Supreme Court of Canada, while accepting that a person, by moving from private life into the public arena, did not forfeit his right to protection from statements unfairly reflecting on his personal reputation, felt that the mere association of the plaintiff with a Tammany regime was not sufficient to impute personal corruption to him. Moreover, in light of the background circumstances, the statements in the paper had not transgressed the bounds of fair comment.

In the context of a tort action in which what was said, by whom and to whom, and what is meant, are of vital significance, evidential problems often loom large. Their importance is highlighted in the Supreme Court decision in *Fraser* v. *Sykes.*[36] The defendant, the then Mayor of Calgary, charged in two public statements that city council had been misled by a firm of developers and their legal representative into believing that it was a condition of proceeding with a commercial development that an adjacent street not be blocked off. The mayor claimed that he had previous undertakings from the developers that this was not a difficulty. In his comments he also implied that the plaintiff, the legal representative, had not followed instructions. A slender majority of the Supreme Court of Canada agreed with the judgements of the two lower courts that these words were defamatory of the plaintiff and injurious to his reputation. They were satisfied with the conclusion reached by the lower courts largely on the basis of the plaintiff's evidence that the defendant had misrepresented the background facts and that no undertaking had been made by the developers. The minority in the Supreme Court found the evidence of the defendant more compelling, particularly in light of the fact that, in their opinion, it was uncontradicted as to the previous undertaking of the developers. In the light of that evidence, they could not see how the statements could be classified as defamatory of the plaintiff. Reading the decisions of Justices Ritchie and Laskin one cannot help feeling that he is reading the facts of two different cases. The very real division of opinion in the Supreme Court in this case points out the importance of the courts having as complete a record of the background facts as possible.

DEFENDING A DEFAMATION ACTION FROM THE MUNICIPAL ARENA

Establishing that a statement is defamatory does not necessarily conclude the question of liability. The defendant may have a defence available to him which, if successfully pleased, will relieve him of that liability. The most important defence as far as the conduct of municipal government is concerned is that of qualified privilege. The perimeters of

[36][1974] S.C.R. 526.

and the rationale for this defence have their most eloquent statement in the judgement of Lord Diplock in *Horrocks* v. *Lowe*[37] which involved a defamatory statement at a municipal council meeting:

> My Lords, as a general rule, English law gives effect to the ninth Commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction: if he cannot prove that defamatory matter which he published was true he is liable in damages to whomsoever he has defamed . . . . The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny, has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters with respect to which the law recognizes that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue. . . . It is lost if the occasion which gives rise to it is misused. For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit — the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege.[38]

In the case of municipal government the special reason of public policy is clear. It is the need to allow those involved in government to communicate freely and forthrightly with each other in promoting the public welfare. It is taken as an article of faith in our democratic system of government that more is to be gained by honest and candid statements of opinion and criticism than by timidity and circumlocution. As Lord Diplock points out "they may be swayed by strong political prejudice, they may be obstinate and pig headed, stupid and obtuse; but they were chosen by the electors to speak their minds on matters of local concern . . ."[39].

In a succession of cases the courts have recognized that a number of phases of and relationships within municipal government are occasions of qualified privilege. From what has been said already it is clear that the meetings of municipal council enjoy the privilege.[40] Whether the statement made in council reflects adversely on a fellow councillor or a citizen, as long as it is in the context of a matter of issue of public interest and legitimately of concern to the municipality the privilege will

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[37]*Supra*, footnote 14.

[38]*Ibid.*, at 668-9.

[39]*Ibid.*, at 671.

[40]The Canadian courts have followed the English case of *Royal Aquarium* v. *Parkinson*, [1892] 1 Q.B. 431 (C.A.) which firmly established that the privilege is qualified and not absolute. See *e.g. Edwards* v. *Gatlman*, [1928] 3 D.L.R. 187 (B.C.S.C.). One has to conclude that courts feel that the deliberation of municipal councils do not embrace the important matters of state and national and provincial policies which occupy the federal parliament and provincial legislatures and which warrant absolute privilege.

apply.[41] The privilege is not confined to the meetings of council. It extends to the meetings of committees and boards to which a municipality has delegated functions. Thus in an old Ontario case, *Hopewell* v. *Kennedy,*[42] a statement made by an alderman to a library committee of which he was a member which was defamatory of a contractor working on a library building was held to be privileged. Documentation considered by these bodies, such as agenda, reports and minutes will generally be covered by the privilege.[43] It also seems to be accepted that it is no impediment to the operation of the defence, in relation to council and its organs, that meetings are public and that the press is present.[44]

Communications between officials or servants of the corporation and the council and its subordinate organs and among officials or servants may also enjoy privilege.[45] The effective flow of information, ideas and opinion within and on behalf of the corporation is considered essential to its functioning. The necessary qualification here is that the parties have a legitimate correlative duty and interest in the communication of the statement. Qualified privilege may also extend to the work of consultants retained by the municipality. Thus, in *Newton* v. *City of Vancouver*[46], the report of medical commissioners appointed by the city, which was libellous of the proprietor of a private hospital in Vancouver, was held to be privileged.

The ambit of qualified privilege extends beyond the confines of the corporation itself. For example, communications among ratepayers,[47] and between municipal officers and commercial firms doing business in the city or town, have been held to be privileged where a legitimate common interest exists.[48]

Having said all of this, it is important to recognize that there are limits to the application of the defence of qualified privilege. In the first place it has to be recognized that qualified privilege applies to occasions,

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[41]See *e.g., Horrocks* v. *Lowe, supra,* footnote 14; *Edwards* v. *Galtman, supra,* footnote 40; *Faminow* v. *Reid, supra,* footnote 33; *Savidant* v. *Day,* [1933] 4 D.L.R. 456 (P.E.I.S.C.).

[42](1905), 9 O.L.R. 43 (Div. Ct.).

[43]See *e.g., Nowland* v. *Moncton Publishing Co. Ltd.,* [1952] 4 D.L.R. 808 (N.B.C.A.) a sanitary engineer's report considered at local Board of Health meeting.

[44]See *Hopewell* v. *Kennedy, supra,* footnote 42.

[45]See *Nowlan* v. *Moncton Publishing Co. Ltd., supra,* footnote 43.

[46](1932), 46 B.C.R. 67 (B.C.S.C.).

[47]See *Blagden* v. *Bennett* (1855), 9 O.L.R. 593 (C.P.D.).

[48]See *Hanna* v. *De Blaquiere* (1854), U.C.Q.B. 310. (Solicitor representing municipality to loan company dealing with road contractor); *Jones* v. *Brooks* (1974), 45 D.L.R. (3d) 413 (Sask. Q.B.) (mayor to sales manager of company wishing to employ agent in town).

rather than the people involved in the occasions. Accordingly, once an individual moves outside an occasion in which the law recognizes a duty or interest in communicating the privilege is lost.

It is well established in Canada that the fact that a man moves from private into public life does not give every one else a privilege to undermine his reputation publicly.[49] Unlike the situation in the United States, where a qualified privilege exists in relation to public comments on persons in political life, Canadian law limits its protection to fair comment on matters of proven fact which are of genuine public interest. This means that public statements made outside the normal forums for debate and discussion in municipal government — for example in the press, on the air-waves or at political rallies — are not likely to be privileged. In *Loan* v. *MacLean*[50] the mayor of a British Columbian municipality moved outside the range of qualified privilege when he chose to use as the forum for abusive comments against an alderman, the local radio station rather than the council chamber. Also instructive in this regard is the English case of *De Buse* v. *McCarty and Stepney Borough Council.*[51] A committee of investigation was set up by the defendant council to look into allegations that certain employees had been engaged in stealing gasoline from the borough. The report named the individuals who had been accused, indicated that the allegation had been reiterated, and was vigorously denied by the men in question. No finding was made as to the alleged facts, but the committee did recommend that all but one of the employees be transferred to other positions. The report was published in the agenda of a meeting of council which was sent to the public libraries in the borough and a copy of which was affixed on or near the town hall. The Court of Appeal in a defamation action brought by the employees mentioned in the report found that, assuming the report to be defamatory, the defence of qualified privilege failed because at the juncture at which the report was published to the ratepayers the council had no duty or interest in common with the ratepayers which would justify its publication. By the same token the ratepayers at that point in time had no interest in receiving or duty to receive the report. The court obviously felt that when council refers a matter for study or investigation to a committee, the report of the latter is a private matter between the committee and council until it has been approved and acted upon by the council. Until that point in time the ratepayers or the electorate at large have no right to be informed. This seems eminently fair and the case should be an object lesson to those who might be tempted to circumvent the normal processes and sequences of municipal government in order to go public on issues.

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[49]*Boland* v. *Globe & Mail Ltd.*, [1960] S.C.R. 203.

[50](1975), 58 D.L.R. (3d) 228 (B.C.S.C.).

[51][1942] 1 All E.R. 19 (C.A.).

The sort of problem which came to the surface in *De Buse* is now complicated by the fact that meetings of municipal councils and their committees and boards are public and open to the press. Indeed, in several provinces the media enjoy statutory qualified privilege for "fair and accurate" reports of the proceedings of municipal councils and other organs of municipal government.[52] The question arises whether qualified privilege might be lost when a sensitive and potentially defamatory issue is discussed in the council chamber in public prior to action being taken. One suspects that the courts on the basis of previous authority would come down in favour of a qualified privilege obtaining, on the ground that it is important to the public interest that open and full debate be sustained. However, one can envisage situations in which the material is so sensitive that judicial doubt may creep in. It may be instructive to note that in England a statutory qualified privilege attaches to agenda items or particulars which are made available to members of the public or press in relation to meetings which are required by law to be public.[53]

As Lord Diplock points out in *Horrocks* v. *Lowe*[54] the defence of qualified privilege is lost if it is abused. In the technical jargon of the law, qualified privilege will be forfeit if malice on the part of the person making the defamatory statement can be found. The burden is upon the party alleging defamation to prove malice. Where a person in making a statement has acted in good faith and believes in the truth of what he says, then malice will not be found. Conversely where he acts from base motives and does not believe what he says, malice will at least be inferred. It also seems to be settled that where an individual makes a statement recklessly, not caring whether it is true or false, malice will be imputed to him. Finally, even if a person believes in the truth of what he says, he may lose the privilege if his predominant motives in publication are dishonourable; for example, where he acts out of spite.[55] A good example of a recent case in which a court had little trouble in finding evidence of malice is *Drouin* v. *Gagnon*.[56] The plaintiff and defendant were ratepayers appearing at a meeting of a rural municipality in relation to a proposal for an access alley from the street to the plaintiff's

[52]*The Defamation Act*, R.S.C. 1970, c. 87, s. 10(1); *Libel and Slander Act*, R.S.S. 1965, c. 107, ss. 10 and 11; *Libel and Slander Amendment Act*, S.B.C. 1969, c. 16, s. 2; *Libel and Slander Act*, R.S.O. 1970, c. 243, ss. 3 and 4; *Defamation Act*, R.S.M. 1970, c. D20, ss. 10 and 11; *Defamation Act*, R.S.N.B. 1973, c. D-5, ss. 9 and 10; *Defamation Ordinance*, R.O. Y.T. 1971, c. D-1, ss. 10 and 11; *Defamation Act*, R.S.N.S. 1967, c. 72, ss. 10 and 13.

[53]*Public Bodies (Admissions to Meetings) Act* (1960), (8 & 9 Eliz. II), s. 1(5).

[54]*Supra*, footnote 14.

[55]See Williams, *The Law of Defamation* (Toronto: Butterworths, 1976), at 75-106, for general discussion of qualified privilege.

[56](1975), 58 D.L.R. (3d) 428 (Alta. T.D.). Another example is *Paul* v. *Van Hull* (1962), 36 D.L.R. (2d) 639 (Man. Q.B.) in which two municipal councillors and a journalist sent letters defamatory of other members of council to a provincial cabinet minister and to the press. The charges contained therein were completely unsubstantiated.

property. In the course of the meeting the defendant addressed the plaintiff and stated that the reason he had put a fence between their lots was to stop teenagers coming on his premises with whiskey and liquor obtained from the plaintiff's establishment. Chief Justice Milvain of the Alberta Supreme Court Trial Division found that the words were defamatory as suggesting that the plaintiff was illegally supplying liquor to juveniles and that the statements were made maliciously. They had no connection with the business before the council. Moreover, the defendant had no evidence to substantiate the statement.

The limits of the interaction of qualified privilege and malice, while easy to state, sometimes give rise to problems in practice. This is likely to be so in the case of communications which are made in settings in which tempers are high and political bias is accentuated. Such a setting is municipal government. What happens with the situation where the person making a statement believes fervently in its truth, but where his belief is a statement believes fervently in its truth, but where his belief is buttressed by his own prejudice and anger? Until recently the answer might well have been that he lost the privilege because his prejudice and anger outweighed his belief in the truth of what he said.[57] The decision of the House of Lords is *Horrocks* v. *Lowe*[58] takes a new and refreshing approach to the issue proceeding from the premise that free and frank discussion in the public forums of government is healthy and that the courts should be realistic about the environment and the political dynamics of the council chamber.

A city corporation which had a Conservative majority owned land which they leased to the local Conservative Club to allow it to erect a club house. This was done in ignorance of a restrictive covenant which attached to the land and which prohibited building on that plot. A company of which the plaintiff, a Conservative councillor, was chairman and majority shareholder had the benefit of the covenant. When the existence of the covenant was discovered, the plaintiff refused to release it because of detriment to adjacent owners, and the work on the club house had to be abandoned even though the building was near completion. As a result the corporation had to pay significant compensation to the Club to allow them to relocate the building elsewhere. At a meeting of the town council the defendant, a Labour councillor, made a speech on the issue in which he strongly criticized the plaintiff in terms which were defamatory and untrue. In particular he charged that the plaintiff had misled the town, the Leader of his party and his political and club colleagues. It was clear that the defendant was angered by the whole affair and by the conduct of the plaintiff and was distinctly prejudiced in his reaction to the matter. Their Lordships held that, however prejudiced the defendant had been, or irrational in

[57]*Supra*, footnote 1, at 444 *per* Lord Esher M.R.

[58]*Supra*, footnote 14.

leaping to conclusions which were adverse to the plaintiff, he had believed in the truth of what he said.

The judgement of Lord Diplock, speaking for the court, is a model of the sort of reasoning which is sensitive to the setting in which this type of conflict arises and the realities of debate and discussion therein. He was particularly careful to caution against confusing improper motives and lack of belief in or indifference to the truth:

> Judges and juries should, however, be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. The motives with which human beings act are mixed. They find it difficult to hate the sin but love the sinner. Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it. It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that "express malice" can properly be found.[59]

In defining "honest belief" he takes pains to warn against applying standards of perfection. The resulting "portrait" of the defamer who acts in good faith promises to become a classic statement of the law:

> But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognize the cogency of material which might cast doubt on of the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be 'honest', i.e. a positive belief that the conclusions they have reached are true. The law demands no more.[60]

The House of Lords in this judgement have affirmed the importance of the public interest in free and frank communication in municipal government. They have stated plainly that the law should not inhibit strong criticism even where it has an intensely partisan and irrational flavour to it. In their minds, the alternative would be an

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[59] *Ibid.*, at 670.

[60] *Ibid.*, at 669.

unreasonable restriction on democratic debate. In this writer's mind, the case stands as an important landmark in clarifying the ambit of free speech in relation to defamation.[61]

The defence of qualified privilege applies even though the defendant has his facts wrong and his opinion is misguided, unfair and unwarranted. It is thus distinguishable from two other defences to defamation, justification and fair comment. Justification is raised when the defendant claims that the substance of his statement is true.[62] If successfully pleaded the statement loses its defamatory quality. By its nature this defence is difficult to prove, because success depends not only on proving that the factual basis for what is said is correct, but also that the resulting imputations and innuendos are justified. Unless the person making the statement is in full possession of the facts, this is likely to be an elusive objective. Occasionally, however, it has been pleased successfully in the context of defamation in municipal government. Thus in *Nixon* v. *O'Callaghan*[63] the Ontario Court of Appeal sustained this defence when the defendant, the deputy reeve of a county, in order to vindicate his own reputation from the implication in a judicial report that he had been engaged in malversation of country funds, gave a copy of a later and personally favourable report together with copies of supporting affidavits from employees of the county to a reporter. The report and the affidavits contained material indicating that in fact the plaintiff had been guilty of malversation. The court found the charge to be "proven to the hilt".

Fair comment is available as defence in a potentially wider range of situations and can sometimes be pleased where qualified privilege is unavailable.[64] It is of interest in the context of the present paper because the primary condition for its application is that the statement which is the subject of the action must have been made on a matter of public interest. Accordingly, it may be of utility in the sphere of municipal politics. One finds that it is a defence generally raised by a branch of the media when faced with an action for a statement relating to a public issue. By statute a newspaper or broadcaster is entitled to qualified privilege for a "fair and accurate" report of the proceedings of municipal councils and their various organs.[65] Once the paper or broascaster moves outside the ambit of reporting and begins to comment, the qualified privilege is lost and the publisher has to depend on fair comment. As has already been noted, the latitude allowed municipal politicians under qualified privilege is far wider, embracing

[61](1975), 58 D.L.R. (3d) 428 (Alta. T.D.).

[62]See Williams, *supra*, footnote 55, at 117-21.

[63][1927] 1 D.L.R. 1152 (Ont. C.A.).

[64]See Williams, *supra*, footnote 55, at 113-117.

[65]*Supra*, footnote 52.

both fact and comment. However, as has also been indicated, there are institutional and temporal limits to qualified privilege, and even municipal officials and councillors may find themselves outside its protection. Typically this happens when they decide to go public by making personal statements to the media outside the council chamber — for example, through the ubiquitous press conference.

In addition to the requirement that the matter be one of public interest, the defendant must satisfy two other conditions. In the first place, the facts upon which the comment is based must be proven as true. If the facts are wrong then the defence is of no avail. This proved to be the downfaull of Mayor Sykes in *Fraser* v. *Sykes.*[66] All three courts agreed that he had got his facts wrong. Secondly, the comment must be "fair". This term is something of a misnomer because it does not mean "reasonable" comment, but comment which "any fair man, however prejudiced he may be, however exaggerated or obstinate his views" could have made.[67] In this sense it comes close to providing the protection afforded by qualified privilege. In common with qualified privilege, the defence is lost if the plaintiff can prove that malice actuated the comment.

The defence of fair comment and its application in the context of the relationship between municipal politicians and the press, was the object of discussion and of a significant cleavage of opinion in the Supreme Court of Canada decision in *Chernesskey* v. *Armadale Publishers Ltd.*[68] The plaintiff, a city of Saskatoon alderman, claimed that a letter written by two law students to the editor of the *Star Phoenix* and published in the letters to the editor column, was defamatory of him. In the letter written under the heading "Racist Attitude", the writers commented on a report carried by the paper earlier, which dealt with a petition from white residents opposing the location of a native rehabilitation centre in their neighbourhood, expressing shock and disgust at the rascist attitude reported. Having strongly attacked the representative of the white residents for his negative attitude towards native peoples, they went on to criticize the alderman for his suggestion that pending clarification of the zoning situation, the establishment should cease its operation. They concluded by hoping that the rascist resistance exhibited would be replaced by support of and encouragement for the centre. The plaintiff sued the publisher and editor of the newspaper. An attempt to implicate the law students as third parties proved abortive, and they did not testify. At trial the jury found the contents of the letter to be defamatory of the plaintiff and damages of $25,000 were awarded to him. The trial judge did not put the defence

[66][1974] S.C.R. 526.

[67]*Merivale* v. *Carson* (1887), 20 Q.B.D. 275, *per* Lord Esher M.R. at 281.

[68](1979), 7 C.C.L.T. 69 (S.C.C.).

of fair comment to the jury on the ground that there was no evidence that the words complained of expressed the honest opinion of anyone, not the writers of the letter, or any member of the editorial staff of the newspaper or the publisher. The majority of the Saskatchewan Court of Appeal concluded that the trial judge had erred in withholding the defence of fair comment from the jury. On the facts, the condition of the defence, including "honest belief" might have been met. Bayda J.A., in particular, stressed that where a newspaper does not hold the opinions expressed in the writings but honestly believes that they repressed the genuine opinions of the writer, the defence of fair comment will succeed in the absence of malice on the part of the newspaper. A new trial was ordered.

On appeal to the Supreme Court, the decision of the trial judge was restored and the findings as to defamation and damages affirmed. The majority and minority opinions raise in bold relief the question of where to establish an appropriate balance in the law of defamation between freedom of speech and the protection of the individual from adverse comment and criticism. Regrettably, the Court tipped the balance alarmingly in the direction of the confining of free speech and public debate on issues of political and social significance. All of the judges in the Supreme Court agreed that the burden of proof in fair comment lies with the defendant. They parted company on the cardinal issue of how much freedom a newspaper publisher or editor enjoys in publishing the views of others on public issues with which he does not agree, and which may be strong enough to be defamatory.

The circumstances of this case and the issue before the court involved very serious policy considerations. Remarkably, the majority chose to ignore these entirely. In the judgements of both Ritchie and Martland J.J., the main issue was confined to whether the trial judge was right on the evidence before him to refuse to instruct the jury on fair comment. Both concluded that he was. Both judges found as a matter of principle that a publisher cannot rely on the defense of fair comment if he personally does not believe in the truth of the comment, and cannot demonstrate that the original writer has that honest belief. In their minds this followed necessarily from a succession of decisions requiring proof by the defendent of "honest belief" on his part when relying on fair comment. They concluded the publisher of a letter can be in no better position than the writer. However, the only reference to a possible policy issue occurred at the close of Mr. Justice Ritchie's judgement where he suggested that nothing in the principle followed prevents a newspaper from publishing letters with which it disagrees, or promoting a candid exchange of opposing views on the conduct of a public figure. The condition is, of course, that the material is not defamatory. Here there is no evidence of sensitivity to the great difficulties which this principle raises for the press, nor recognition of the homogenization of opinion on political and social matters which it implies.

By contrast, Dickson J. for the minority took time to discuss fully the policy factors before articulating the principle to be applied. In what is, by any standards, one of the most socially sensitive statements to emanate from a Canadian judge in recent years, he set out the implications for both the press and society in general of adopting a theory which identifies publisher and writer in these cases. After noting that letters columns are designed to stimulate uninhibited debate on every public issue, and that any identity of the editor with all of those views would be undesirable, if not impossible, he examined the social context in which the issue arises.

> It is not only the right but the duty of the press, in pursuit of its legitimate objectives, to act as a sounding board for the free flow of new and different ideas. It is one of the few means of getting the heterodox and controversial before the public. Many of the unorthodox points of view get newspaper space through letters to the editor. It is one of the few ways in which the public gains access to the press. By these means, various points of view, old and new grievances and proposed remedies get aired. The public interest is incidentally served by providing a safety valve for people.[69]

He went on to show the sobering consequences of forcing newspapers to publish only that with which they can identify. He did so, acutely conscious of the economic forces in this country which have progressively decreased the number of newspapers published.

> Newspapers will not be able to provide a forum for disemination of ideas if they are limited to publishing opinions with which they agree. If editors are faced with the chance of publishing only those letters which espouse their own particular ideology, or being without defence if sued for defamation, democratic dialogue will be stifled. Healthy debate will likely be replaced by the monotonous repetition of majoritarian ideas and conformity to accepted taste. In one-newspaper-towns, of which there are many, competing ideas will no longer gain access. Readers will be exposed to a single political, economic and social point of view. In a public controversy, the tendency will be to suppress those letters with which the editor is not in agreement. . . .[70]

Having developed a public policy argument which clearly shows a high level of sensitivity to the needs of contemporary Canadian society, he found that the law accommodated and reflected his views on the policy factors. He noted the support in the leading texts and cases for the contention that the determination of whether a comment is fair is an objective one of assessing whether a person, however prejudiced his views may be, could honestly subscribe to that point of view, and that this determination is not to be confused with the subjective issue of whether the publisher was actuated by malice. In a situation in which the writer and publisher of a letter are different people, the defence of fair comment is available to the publisher if the comment satisfies the objective test, and no malice can be attributed to him in publishing it. The fact that the writer may be acting maliciously is not relevant, as long

[69] *Ibid.*, at 96.

[70] *Ibid.*, at 96-7.

as the publisher was unaware of that fact. This view of the law seems to the writer to preserve the defence in its traditional form, and to apply its two elements in a rational and fair way to two parties who have contributed to the publication of defamatory remarks, but who normally cannot beidentified with each other. The result is that the newspaper publisher and editor are not forced into the position of reluctant censors and freedom vigorously to debate public issues is preserved. This freedom is important at all levels of the political process. It is particularly important at the local level where a significant number of decisions affect the day-to-day lives of citizens.

Predictably the *Cherneskey* decision caused great alarm and consternation amongst the members of the press. However, reaction was not confined to them. It offended the opinions of many others with a keen interest in preserving free speech and maintaining the broadest and most candid canvassing of public issues. For the latter, the amjority opinion had sobering implications which went far beyond the context of the *Cherneskey* case. It was observed that the principle espoused by the majority could extend to any medium in which comments published or broadcast did not represent the views of the publisher or broadcaster. Potentially, it embraces "hotline" and opinion programs on radio and television and a wide range of printed materials, including magazines, articles, and books. In each instance, the publisher who disseminated independent comment could not breathe confidently unless he established that he honestly shared that opinion, or if he did not, that it was honestly held by the commentator.

These broader considerations led law reform bodies in two Canadian jurisdictions, Ontario and Alberta, to consider the problem and to recommend an amendment to defamation legislation designed to protect publishers in cases like this. The Ontario and Alberta commissioners to the Uniform Law Conference recommended to the 1979 Conference that the amendment read:

> 8.1 Where the defendant published defamatory matter that is an opinion expressed by another person, a defence of fair comment shall not fail for the reason only that the defendant or the person who expressed the opinion or both, did not hold the opinion, if a person could honestly hold the opinion.[71]

Some concern was expressed at the Conference that this formulation might go too far in the protection afforded, for it might cover a publisher even if he knew that the author did not hold the opinion stated. As a result a slightly different amendment was adopted:

> 8.1(1) Where the defendant published alleged defamatory matter that is an opinion expressed by another person, a defence of fair comment shall not fail for the reason only that the defendant did nothold the opinion if,
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> (*a*) the defendant did not know that the person expressing the opinion did not hold the opinion; and

[71]See draught report on *The Rule in Cherneskey*, (Edmonton: Instituteof Law Research, 1979), at 9.

> (*b*) a person could honestly hold the opinion.
> (2) For the purposes of this section, the defendant is not under a duty to inquire into whether the person expressing the opinion does or does not hold the opinion.[72]

This formulation has subsequently been accepted as the basis for recommendations for changing the law in Alberta.[73] It is to be hoped that each province will enact such a remedial provision. The *Cherneskey* decision throws the balance of interests in the law of defamation dangerously out of kilter. This is a balance which has been painstakingly built up by the judges for a century and which reflects a remarkable degree of consensus on the dangers of bridling candid public comment. That it should be disturbed in an era when there is evidence that we are increasingly becoming the passive receptacles of printed and broadcast pabulum is distressing.

A defence which has recently been argued successfully in a case involving defamation in the municipal arena is that of consent. For some time it had been assumed on the basis of English authority that a person could consent to the publication of a defamatory statement and so effectively preclude himself from subsequently suing for it. In *Chapman* v. *Ellesmere*[74] the plaintiff was taken to have consented to the publication of the report of an enquiry concerning him conducted by the Jockey Club. The report to his mind contained an innuendo of improper conduct. The status of the defence in Canada and its ambit were, however, uncertain. This uncertainty may have been resolved by the judgement of Mr. Justice MacPherson of the Saskatchewan Court of Queen's Bench in the rather bizarre case of *Jones* v. *Brooks*.[75] The plaintiff was a lawyer in private practice whose services were retained from time to time by the municipality in which he had a branch office. He was asked to assist in facilitating an agreement for the sale of land owned by the municipality to a company which wanted to develop it. At the time of the contract the company was not yet incorporated. The contract which was executed by both parties contemplated that the plaintiff would act for both. Subsequently, the plaintiff's association with the company strengthened, for he became secretary-treasurer and a director. None of this was revealed to the town for which he was carrying out other legal work. He was subsequently advised by the town administrator that his association with the municipality was being terminated. It transpired that the town had sought independent legal advice regarding its position under the contract and had been advised that its legal position was shaky in a number of respects. After the termination of his association with the municipality the plaintiff found

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[72]*Ibid.*, at 10.

[73]*Supra*, footnote 71.

[74][1932] 2. K.B. 431 (C.A.).

[75](1974), 45 D.L.R. (3d) 413 (Sask. Q.B.).

that his business in the town was declining and heard rumours that he was being disparaged in certain quarters. He thereupon retained the services of two private detectives who were dispatched with hidden tape recorders to interview the defendants, the mayor and two councillors. All three men made statements which were defamatory of the plaintiff. In the action which the latter brought for defamation, the judge decided that the fact that the statements had been made to agents of the plaintiff did not gainsay its publication. However, his action could not succeed because he had consented to the statements being made. The plaintiff "had good reason when he sent the detectives to anticipate that the response by the defendants to the inquiries might be defamatory".[76] To his mind this was the essence of *volenti* — "the knowing consent of the plaintiff to the defendant's wrong which the plaintiff expected".[77]

TO SUE OR NOT TO SUE

The cynic might be forgiven for characterizing the defamation suit as a fool's paradise. Certainly the combined wisdom of those who have been active in defamation litigation over the years would suggest that such actions should not be launched lightly. While it may appear to the potential plaintiff that this is the only way to vindicate his character, he should be made to recognize that the law contains a number of substantive and procedural pitfalls which may frustrate the endeavour and that even a successful suit may be a dubious victory if it has meant further scrutiny of and publicity about his reputation.[78] This counsel of restraint may be more difficult to accept in the heady environment of municipal politics than elsewhere, but no less apposite.

The legal system is, of course, sensitive to the dangers of proceeding to trial in defamation cases. While it has stopped short of mandating the use of apology or retraction, it does recognize that both of these devices may be useful in neutralizing the "sting" of a defamatory statement. Unless relations between the parties have reached such a low ebb that this type of accommodation is impossible, both should be encouraged to consider seriously disposing of the matter in this manner. From the plaintiff's point of view it may provide the mental and emotional satisfaction he needs. From that of the defendant it demonstrates his good faith and concern to set the record straight.

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[76] *Ibid.*, at 420.

[77] *Ibid.*, at 420.

[78] A good example of what might be described as a plaintiff's "defamation wish" is the recent Manitoba case of *Syms* v. *Warren* (1976), 71 D.L.R. (3d) 558 (Man. Q.B.) in which the plaintiff, the Chairman of the Liquor Control Commission, about whom false rumours were spread concerning an impaired driving charge, went on an open line show to talk about the issue and the investigations which had cleared him of any wrongdoing. An unidentified caller made new allegations against him. The radio station was found liable for not using its delayed action system to stop the comment from the caller. However, the plaintiff's damages of $2,000 were clearly affected by the fact that he had foolishly agreed to go on the air.

For the defendant, it is important to recognize that for an apology to be effective it must be genuine, involving a withdrawal of charges and a statement of regret for making them. The character of an apology and how a grudging attitude on the part of the defendant may backfire featured in the recent British Columbia case of *Thompson* v. *N.L. Broadcasting Ltd.*[79] The plaintiff who was the mayor of Kamloops was seeking reelection. The defendants on three different occasions broadcast editorials which falsely accused the Mayor of firing the administrative staff at city hall and of overbilling for travel expenses. The day after the first editorial the plaintiff was permitted to broadcast a rebuttal. A so-called apology was broadcast six weeks after the second editorial and no apology or retraction followed the third. The "apology" which was broadcast repeated the charges, and the Mayor's rejoinders and merely concluded "We are prepared to accept Mayor Thompson's answer". Mr. Justice Schulz found *inter alia* that the apology was not a full apology, nor a proper retraction. The defendant should have admitted "that the charge was unfounded, that it was made without proper information, under an entire misapprehension of the real facts . . . and that he [regretted] that it was published . . .".[80] It seems clear that this grudging attempt at an apology was a factor in persuading the judge to award punitive damagesof $2,500.

The tactical caution which is essential in defamation actions is also underlined in the *Thompson* case. A mitigating factor in the assessment of damages was that the plaintiff's solicitor had gone out of the way to give publicity to the defamation of his client.

CONCLUSION

As was stated at the outset, the environment of municipal politics has been fertile ground for defamation actions. Indeed, there is a sufficiently large group of cases of this type that many of the major substantive issues in this area of the law have been canvassed. The use of a functional setting brings a clearer focus to the issues with which the courts have to deal, and the weighing of interests which they have to undertake in defamation actions. At the same time, it is possible to highlight concepts and factors which are unique to the particular setting.

Municipal politics have in recent years provided a particularly good test bed for examining the underlying balance in the law of defamation between freedom of speech and protection of the individual from unfair comment. Unfortunately, there is evidence of a cleavage of opinion on where the balance should rest. On the one hand we have the

[79](1976), 1 C.C.L.T. 278 (B.C.S.C.).

[80]*Ibid.*, at 292.

enlightened views of the House of Lords in *Horrocks* v. *Lowe*,[81] affirming the need to protect basic democratic values of free and frank public comments and debate. On the other there is the indifference of lower Courts in England and Canada in *Campion*[82] and *Prince George*,[83] and of the majority of the Supreme Court of Canada in *Cherneskey*[84], to those same values. It is important that where the balance has been upset it be corrected. In the case of the availability of the defamation action to governmental entities, this may still be achieved by judicial determination at higher levels. With the application of the defence of fair comment to the publication of independent opinion legislative intervention is essential.

On a more positive note, the case law demonstrates that the courts are generally quite realistic and sensitive in the way in which they determine what is or is not defamatory, and the circumstances in which qualified privilege and fair comment are available in local government settings. Moreover, the *Prince George* and *Campion* cases apart, there is evidence that the courts are attuned to the realities of applying the law of defamation to the municipal corporate entity. In particular, there is evidence that they appreciate the limits of corporate responsibility in relation to this tort action.

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[81]*Supra*, footnote 14.

[82]*Supra*, footnote 10.

[83]*Supra*, footnote 8.

[84]*Supra*, footnote 68.